IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 210 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment?	NO
2	To be referred to the Reporter or not?	NO
3	Whether Their Lordships wish to see the fair copy of the judgment?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?	NO
5	Whether it is to be circulated to the Civil Judge?	NO

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HAJISHA SIDISHA SHAHMADAR AND ANOTHER - Appellants
Versus
STATE OF GUJARAT – Respondent

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Appearance :
MR RAJESH M AGRAWAL for the Appellants.
MR LR POOJARI, ADDITIONAL PUBLIC PROSECUTOR for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 24/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal preferred under Section 374 (2) of the Code of Criminal Procedure is directed against the judgment and order dated 16-08-2003 passed by the learned Special Judge, Jamnagar in Special Criminal Case No. 2 of 2002 imposing sentence of RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only) under Section 20 (b)(ii)(B) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short **"NDPS Act"**).

2. When the appeal was taken up for final hearing, Mr. R. M. Agrawal, learned Advocate for the appellants, at the outset, submitted that though the appeal is filed challenging the judgment as a whole, but the sentence imposed by the learned Judge with respect to the contraband article seized from the appellants was so disproportionate that on that ground itself the appeal was required to be allowed and, therefore, he would confine his submissions on the question of sentence only without making submissions on the merit. In view of this submission, we do not find it necessary to narrate the facts of the case nor discuss the oral deposition as well as the documentary evidence threadbare.

3. After considering the oral evidence and the documentary evidence adduced during the course of trial, the learned Special Judge held that the prosecution had conclusively established that on 12-06-2002, the appellants were in possession of 1792

grams of ganja without pass or permit, and as they were found in illegal possession of contraband article – ganja, the learned Special Judge convicted the appellants and imposed the punishment as referred to earlier.

4. Mr. Agrawal, learned Advocate for the appellants, submitted that there is no dispute about the recovery of the contraband article (ganja) from the possession of the appellants which was to the tune of 1792 grams. However, the learned Advocate submitted that considering the provisions of Section 20 of NDPS Act, when the quantity under question is less than the commercial quantity but greater than small quantity, then the discretion is given to the learned Judge of awarding the sentence which may extend upto 10 years and with fine which may extend to Rs. 1,00,000/- (Rupees One Lakh Only). In the facts and circumstances of the present case, the learned Advocate vehemently submitted that the learned Judge has committed error in holding that the minimum sentence as prescribed under Section 20 (b) (ii) (B) of the NDPS Act is 10 years RI and fine of Rs. 1 Lakh and has, thereby, awarded sentence of RI for a period of 10 years and fine of Rs. 1 Lakh to both the appellants. The learned Advocate submitted that considering the quantity of ganja which was seized from the possession of the appellants, the sentence imposed by the learned Judge is on the higher side and, therefore, the sentence imposed by the learned Judge requires to be altered and

reasonable sentence of 1 year RI and fine of Rs. 1,000/-, in default, further SI for 1 month, be imposed on the appellants.

5. As against the aforesaid submission, Mr. L. R. Poojari, learned Additional Public Prosecutor representing the State, submitted that the learned Judge has rightly imposed the sentence of 10 years RI and fine of Rs. 1 Lakh on both the appellants under Section 20 (b) (ii) (B) under NDPS Act. It is further submitted that as per the jail record, the appellants have undergone nearly 3 years sentence after the conviction and the period of set off comes to 1 year and 2 months. However, taking into account the gravity of the offence and the discretion which is given to the learned Judge under Section 20 (b) (ii) (B) of NDPS Act, the learned Judge has rightly used the discretion and awarded the sentence which is under challenge. However, the learned Additional Public Prosecutor submitted that, in the alternative, the ends of justice would be met if the appellants are imposed sentence which they have already undergone in the present case.

6. This Court has heard Mr. R. M. Agrawal, learned Advocate for the appellants and Mr. L. R. Poojari, learned Additional Public Prosecutor for the respondent-State, at length and in great detail. As stated earlier, we do not consider it necessary to deal with the oral deposition as well as documentary evidence threadbare in view of the submissions made

by the learned Advocate for the parties that they do not dispute the quantity of seizure of the contraband article from the possession of the appellants and therefore, they confine their submissions to the question of sentence awarded to the appellants in the facts and circumstances of the present case.

7. We have also perused Section 20 of NDPS Act and the same is reproduced hereinbelow:

> **"20. Punishment for contravention in relation to cannibis plant and cannabis.** - Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder,-
>
> (a) *****
> (b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable -
>
> (i) *****
> (ii) where such contravention relates to sub-clause (b), -
>
> (A) ******
>
> (B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;
>
> (C) ***** "

On bare perusal of the said provision, it becomes clear that the Court is given discretionary

powers to award the sentence upto 10 years RI and fine of Rs. 1 Lakh. We have also considered the notification specifying small quantity and commercial quantity issued by the Ministry of Finance. On perusal of the said notification and more particularly, Column Nos. 5 and 16 of Item No. 55, it becomes clear that small quantity so far as ganja is concerned, it is 1 Kg and the commercial quantity is described as 20 Kg. The seizure of ganja from the possession of the appellants comes to about 1.800 Grams and, therefore, considering the quantity which was seized from the possession of the appellants, the sentence imposed on the appellants, in our view, is on the higher side. If the quantity is more than the small quantity and less than the commercial quantity, discretion is given to the Court to award sentence under Section 20 of the NDPS Act. However, the learned Judge has committed egregious error and misinterpreted the provisions contained in Section 20 (b) (ii) (B) as well as the notification issued by the Central Government with regard to small quantity and commercial quantity and awarded maximum sentence of 10 years RI and fine of Rs. 1 Lakh, which in our view requires to be altered and, therefore, we pass the following order:

ORDER

For the foregoing reasons, this appeal is partly allowed and the judgment and order dated 16-08-2003 passed by the learned Special Judge, Jamnagar in Special Criminal Case No. 2 of 2002, imposing

sentence of RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default SI for 1 year under Section 20 (b) (ii) (B) of the NDPS Act on both the appellants, namely, Hajisha Sidisha Shahmadar and Basirmiya Husenmiya Bukhari, is altered and both the appellants are now imposed the sentence of RI for a period of 2 years under Section 20 (b) (ii) (B) of the NDPS Act and fine of Rs. 5,000/- (Rupees Five Thousand Only), in default further SI of six months. *Muddamal* be disposed of in terms of the directions given by the learned Trial Judge in the impugned judgment and order.

[ANIL R. DAVE, J.]

[H. B. ANTANI, J.]

/shamnath